(14)

Supreme Court, U.S.
FILED
FEB 9 1998
OFFICE OF THE CLERK

No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

GRANT WOODS
Attorney General

PAUL J. MCMURDIE
Chief Counsel
Criminal Appeals Section

BRUCE M. FERG
Assistant Attorney General
(Counsel of Record)
400 W. Congress, S-315
Tucson, Arizona 85701-1367
Telephone: (520) 628-6504

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I THE SUSPENSION CLAUSE ISSUE CANNOT BE AVOIDED BY RESORT TO AN ERRONEOUS THEORY OF STATUTORY CONSTRUCTION..... 1

II SINCE THE STATUTE IS UNAMBIGUOUS, THE SUSPENSION CLAUSE ISSUE CANNOT BE AVOIDED..... 12

III THE *AMICUS* BRIEFS SUPPORTING MARTINEZ-VILLAREAL PROVIDE NO SUBSTANTIAL REASON TO DISAGREE WITH PETITIONERS' POSITION 14

IV THE COURT POSSESSES JURISDICTION OVER THIS CASE 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bailey v. United States, 116 S. Ct. 501 (1995) 7

Bonin v. Calderon, 999 F.2d 425 (9th Cir. 1993) 15

Brewster v. Gage, 280 U.S. 327 (1930) 9

Brown v. Gardner, 513 U.S. 115, 115 S. Ct. 552 (1994) 2

Bush v. Singletary, 99 F.3d 373 (11th Cir. 1996) 7

BUSHELL'S CASE, 124 Eng. Rep. 1006 (1607) 16

Camarano v. Irvin, 98 F.3d 44 (2d Cir. 1996) 4

Ceja v. Stewart, 1998 WL 23241 (9th Cir. Jan. 20, 1998) 14

Denton v. Norris, 104 F.3d 166 (8th Cir. 1997) 15

Edmond v. United States, 117 S. Ct. 1573 (1997) 13

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 16, 17

Fay v. Noia, 372 U.S. 391 (1963) 16

Felker v. Turpin, 116 S. Ct. 2333 (1996) 5, 9, 19

Ford v. Wainwright, 477 U.S. 399 (1986) 4, 11, 15

Gomez v. U.S. District Court, 503 U.S. 653 (1992) 12

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) 7

Henderson v. United States, 116 S. Ct. 1638 (1996) 6

Herrera v. Collins, 506 U.S. 390 (1993) 15

In re Davis, 121 F.3d 952 (5th Cir. 1997) 11

In re Sapp (McQueen v. Patton), 118 F.3d 460 (6th Cir. 1997) 11

TABLE OF AUTHORITIES – Continued

Page

In re Vial, 115 F.3d 1192 (4th Cir. 1997) 7

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 6

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) 15

Lockhart v. Fretwell, 506 U.S. 364 (1993) 4

Lonchar v. Thomas, 116 S. Ct. 1293 (1996) 8

Lynce v. Mathis, 117 S. Ct. 891 (1997) 2

Marbury v. Madison, 5 U.S. (1 Cranch 137) (1803) 17

Martinez-Villareal v. Lewis, CIV 86 – 296 TUC RMB, unpub. order of Oct. 21, 1994, at 18-19. 14

Nunez v. United States, 96 F.3d 990 (7th Cir. 1996) 7

Preiser v. Rodriguez, 411 U.S. 475 (1973) 11

Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) 1

Rose v. Lundy, 455 U.S. 509 (1982) 4

Salinas v. United States, 118 S. Ct. 469 (1997) 13

Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) 12

Stone v. Immigration and Naturalization Service, 115 S. Ct. 1537 (1995) 5

Stone v. Powell, 428 U.S. 465 (1976) 3

Sumner v. Mata, 449 U.S. 539 (1981) 3

Swain v. Pressley, 430 U.S. 372 (1977) 12

Teague v. Lane, 489 U.S. 288 (1986) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. American-Foreign Steamship Corp., 363 U.S. 685 (1960) 10

United States v. Hayman, 342 U.S. 205 (1952) 16

United States v. Locke, 471 U.S. 84 (1985) 12

United States v. Minker, 350 U.S. 179 (1956) 10

United States v. Scott, 124 F.3d 1328 (10th Cir. 1997) 14

United States v. Wells, 117 S. Ct. 921 (1997) 7

United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) 12

Utah Junk Co. v. Porter, 328 U.S. 39 (1946) 1

Wainwright v. Sykes, 433 U.S. 72 (1977) 3

Weaver v. Graham, 450 U.S. 24 (1981) 2

Whitten v. Tomlinson, 160 U.S. 231 (1895) 18

Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 14

U.S. Const. amend. XIV 17

STATUTES

§ 14, Judiciary Act of 1789 18

21 U.S.C. § 848(q)(4)(B) 12

28 U.S.C. § 1651(a) 20

28 U.S.C. § 1983 11

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2241 3

28 U.S.C. § 2244 7

28 U.S.C. § 2244(a) 5, 10

28 U.S.C. § 2244(b) ..... *passim*

28 U.S.C. § 2244(b)(1) 6, 10

28 U.S.C. § 2244(b)(2) 4, 6

28 U.S.C. § 2244(b)(2)(A) 6, 7

28 U.S.C. § 2244(b)(2)(B) 6, 7

28 U.S.C. § 2244(b)(2)(B)(i) 2

28 U.S.C. § 2244(b)(2)(B)(ii) 2, 4, 11, 20

28 U.S.C. § 2244(b)(3)(E) 19

28 U.S.C. § 2244(d) 10

28 U.S.C. § 2253(c) 5

28 U.S.C. § 2254 ..... 5, 7, 8

28 U.S.C. § 2254(d)(1) 10

28 U.S.C. § 2254(d)(2) 10

28 U.S.C. § 2254(e)(2) 10

28 U.S.C. § 2255 ..... 3, 7

RULES

F.R.A.P. 22 5

F.R.C.P. 60(b) 15

Rule 9(b), Habeas Corpus Rules 5, 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1346-47 (rev. 4th ed. 1968) 10

Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995) 16

Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. CHI. L. REV. 243 (1965)..... 16

Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451 (1966)..... 16

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 171 (1970) 16

JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 179-80 (1956)..... 18

Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 52-55 (1965)..... 17

Rex A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952) 16

WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 273-74 (1980) 16

I

THE SUSPENSION CLAUSE ISSUE CANNOT BE AVOIDED BY RESORT TO AN ERRONEOUS THEORY OF STATUTORY CONSTRUCTION.

A. PLAIN MEANING OF "SECOND OR SUCCESSIVE." (RB 16-24.)

Loathe to engage the Suspension Clause issue, Martinez-Villareal focuses on statutory interpretation. His primary ploy is to erect a false dichotomy between "plain meaning" and "construction" of a statute. (RB at 16-24.) In their opening brief, Petitioners contended that "second or successive petition," as used in amended 28 U.S.C. § 2244(b), is so plain and unambiguous that "statutory construction" cannot be legitimately invoked to extend the limits placed on such petitions, creating an exception for incompetency for execution claims. Martinez-Villareal therefore erects a straw man, portraying Petitioners' view of the statute in simplistic mathematical terms, without reference to the full context. (*Id.* at 19, 23.) Because his approach produces unreasonable results, Martinez-Villareal insists that the idea that the statute possesses a plain meaning is itself unreasonable. Thus, he makes "plain meaning" interchangeable with absurdity and opposed to "construction," so that "construction" equates with reasonableness. Since the court of appeals innocuously labeled its rewriting of the statute "construction," Martinez-Villareal argues that that interpretation of the statute was reasonable.

However, correctly understood, there is no conflict between "construction" of a statute and that statute possessing a "plain meaning." Statutory "construction" is simply "the ascertainment of meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). Meaning can be "plain" even when recourse must be made to something other than the words immediately in question. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). Therefore, even determining that statutory language is so plain that no further interpretive steps are

permissible constitutes "construction," so "plain meaning" and statutory "construction" are not mutually exclusive.

Freed of Martinez-Villareal's false premise, it is easy to see through his attempts to becloud the "second or successive" terminology in ambiguity. His strategy is to generate hypotheticals that he asserts will have absurd results if decided in accordance with the plain meaning of the statute. He claims that his situation is indistinguishable from those hypotheticals, and concludes that the results in his case are statutorily unacceptable. (RB 18-24.) However, the strategy fails at each step. First, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, ___, 115 S. Ct. 552, 555 (1994). When Martinez-Villareal's hypotheticals are exposed to the light of the whole statute, the alleged ambiguities evaporate.

Martinez-Villareal posits a habeas applicant returning to federal court after a reconviction following a successful first petition, one seeking habeas relief from a second conviction occurring after an unsuccessful previous petition, one challenging a parole revocation after unsuccessfully attacking the original trial, or ones questioning denial of incarceration credits or changes to parole eligibility (like *Lynce v. Mathis*, 117 S. Ct. 891 (1997), and *Weaver v. Graham*, 450 U.S. 24 (1981)), as if there is ambiguity about the application of the statute in such situations, but there is none. (RB 18-21.) In the retrial, new charges, and parole revocation situations (and in the cases cited by Martinez-Villareal's footnotes 8 and 9), the claims raised in the second petitions stem from new proceedings, distinct from the original trials. Therefore, they obviously would be permitted: the claims were not presented in the first petitions because the new proceedings did not yet exist, and since "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," § 2244(b)(2)(B)(i) expressly allows such claims to be presented.

On the other hand, the results in *Lynce* and *Weaver* might be different if decided under the amended statute. Section 2244(b)(2)(B)(ii) permits relief only if the error claimed is such that "no reasonable factfinder would have found the

applicant guilty of the underlying offense," thus excluding claims that only implicate sentences. However, all this really tells us is that the grounds for relief under the amended statute are narrower than they were before the amendments, and limitation of habeas relief was the very purpose of Congress. Such narrowing is neither absurd nor an ambiguity in the statute – it is simply a policy decision that Congress was entitled to make, and did make, and made with unmistakable clarity. Does the preclusion of sentence-based claims in successive petitions mean that some potentially meritorious claims cannot be reviewed? Yes – but that is precisely the same situation that existed before habeas jurisdiction was expanded to include state prisoners in 1867, or after the 1966 habeas amendments (which "were intended by Congress as limitations on the exercise of that jurisdiction," *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981)), or after this Court itself prescribed limits on claims that could be considered, in *Stone v. Powell*, 428 U.S. 465 (1976), *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Teague v. Lane*, 489 U.S. 288 (1986). Someone is always left out when such a line is drawn, but that is the very purpose of drawing the line, and it does not make the line either ambiguous or absurd. Martinez-Villareal's real complaint is not that the statute lacks a plain meaning, but that the plain meaning excludes his sentence-based claim. However, such a policy choice is the domain of the legislative body, Congress, not the interpretive organ, the courts.[1]

---

[1] Note 11 (RB at 21-22) and the NACDL brief (13-15) suggest that, because Martinez-Villareal wishes to challenge the "execution" of his death sentence, rather than the validity of his convictions or sentences, 28 U.S.C. § 2241 provides an independent source of authority for habeas relief, free of the constraints on a "successive habeas corpus application under section 2254" imposed by § 2244(b). However, Martinez-Villareal never argued in the district court that § 2241 is a separate source of habeas authority, thereby waving the claim. Further, the cases viewing § 2241 as such an independent source of authority all involve *federal* prisoners, looking for relief beyond the scope of § 2255, and no meaningful authority is offered that § 2241 has ever been utilized as an alternate source of habeas authority in a case involving a state prisoner.

This being so, it is clear that the other authorities relied upon by Martinez-Villareal do not help him. That he asserts "procedural defects" in the 4-day state-court hearing concerning his competence and invokes *Ford v. Wainwright*, 477 U.S. 399 (1986) (see RB 22 n.12), is irrelevant, because no issue of successive petitions was presented to this Court in *Ford* and because *Ford* was decided before promulgation of the express prohibition on sentence-related claims in § 2244(b)(2)(B)(ii). The court of appeals' reliance on the line of cases dealing with dismissal of "mixed" petitions, originating in *Rose v. Lundy*, 455 U.S. 509 (1982) (see RB at 22-23, 33) is also inapt: *Rose* was an interpretive choice by this Court concerning mixed petitions, permissible only because, in codifying the exhaustion doctrine, Congress had neglected to clearly address the issue. 455 U.S. at 516-18. That is worlds apart from this amendment, which precisely categorizes successive claims and then requires that they all be dismissed unless they fall within the carefully delineated exceptions established by § 2244(b)(2).[2]

Martinez-Villareal (and *amicus* ABA) contend that "second or successive petition" is a term of art, freighted with precisely the meaning given it in prior case law, so it cannot

---

[2] The decisions from other courts of appeals relied upon by Martinez-Villareal and the Ninth Circuit (RB 22-23; JA 188-93), although purporting to apply the Act, are clearly distinguishable. First, not one of those decisions indicates that a sentencing issue was involved, so none had occasion to consider the implications of § 2244(b)(2)(B)(ii)'s express preclusion of such claims. Second, the whole line of cases originates in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996). However, *Camarano*'s refusal "[t]o foreclose further habeas review" applies only to cases where there has been "*no federal adjudication on the merits*" (*id.* at 46, emphasis added), and that appears to have been the situation in virtually all the cases following it. Here, by contrast, every issue except competence for execution was litigated for years and decided, so that even the concurring judge below could not conscientiously apply the "no adjudication" theory. (JA 195-95) Legal rules cannot properly be extended beyond the circumstances giving rise to them; "*Cessante ratione legis, cessat et ipsa lex.*" *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993).

be understood more restrictively when used in amended § 2244(b), particularly since the language still appears in Rule 9(b) of the Section 2254 Rules. (RB 23-24; ABA 8-12.) However, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect. . . . The reasonable construction is that the amendment was enacted . . . not just to state an already existing rule." *Stone v. Immigration and Naturalization Service*, 115 S. Ct. 1537, 1545 (1995). Congress could not have manifested its intent any more clearly when it eliminated the "not theretofore presented and determined" proviso in former § 2244(a), as well as the "not adjudicated on the hearing of the earlier application" and the "deliberately withheld the newly asserted ground or otherwise abused the writ" language of former § 2244(b). Because those terms are the content of Rule 9(b), accepting the argument would require this Court to act absurdly, treating the radical revision of § 2244(b) as if it never occurred.[3]

The theory that the Act, though eradicating former § 2244(b), intended to import the identical content back into the statute by nothing more than its use of the phrase "second or successive petition," subliminally incorporating Rule 9(b), is not only implausible, but was effectively rejected by *Felker v. Turpin*, 116 S. Ct. 2333 (1996). The Court recognized that, practically speaking, the Rule was amended by the requirement to obtain permission to file a second petition, which "transfers from the district court to the court of appeals a screening function that would previously have been performed by the district court as required by 28 U.S.C. § 2254 Rule 9(b)." 116 S. Ct. at 2340. Moreover, "[t]he Act *also*

---

[3] *Amicus* ABA (9-10) suggests that the survival of Rule 9(b) signals that Congress considered it consistent with the rest of the Act, and left it untouched, with all the care it exercised in amending F.R.A.P. 22. In fact, the amendment to F.R.A.P. 22 is clumsy, being inconsistent with § 2253(c) about which judges can issue certificates of appealability, so it is quite likely that Congress simply neglected to remove from Rule 9(b) the language that was banished from former § 2244(b).

codifies some of the pre-existing limits on successive petitions *and further restricts* the availability of relief to habeas petitioners. . . . *The new restrictions on successive petitions* constitute a *modified* res judicata rule . . . *The added restrictions which the Act places on second habeas petitions* are well within the compass of this evolutionary process . . . " *Id.*, emphasis added. Thus, it repeatedly affirms that the Act is intended to go well beyond either Rule 9(b) or the previous jurisprudence of the Court, in restricting consideration of successive petitions.[4]

Martinez-Villareal ends this section with the conclusory assertion that Congress could not have imagined its language in § 2244(b)(1) and (2) would be interpreted to preclude "claims presented in the **only** petition in which a federal court is able to hear them at all." (RB 24, emphasis in original.) That, however, is exactly what the plain language contemplates. Thus, if there is a new rule of criminal law which either is not constitutional, or has not been made retroactive

---

[4] Although Rule 9(b) is not expressly modified in the Act, it cannot thwart Congress' intent to fundamentally alter habeas law by revising § 2244(b). When enactments of equal dignity conflict, the one last in time governs. *Henderson v. United States*, 116 S. Ct. 1638, 1646 (1996). Repeals by implication will be recognized when the two acts are in irreconcilable conflict, or the later act covers the whole subject of the earlier one and is clearly intended as a substitute. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). Amended § 2244(b) addresses "second or successive" habeas petitions, the very same subject as Rule 9(b), but the provisions conflict irreconcilably: the Rule is permissive about dismissals ("may"), while the statute is mandatory ("shall"); under the Rule even the permissive dismissal based on prior presentation of a claim cannot occur unless there was a "prior determination on the merits," but § 2244(b)(1) requires dismissal of previously-presented claims regardless of how they were resolved; under the Rule claims that have not been presented before may be dismissed only if the judge finds "abuse of the writ," but the statute requires their dismissal unless they satisfy the sharply defined criteria set out in § 2244(b)(2)(A) and (B); and, as noted in the text, language virtually identical to the Rule was deleted from § 2244(b). Thus, Congress doubtless intended that successive petitions be dealt with under the statute, not the Rule.

by this Court, § 2244(b)(2)(A) precludes its consideration in a successive petition. *See, e.g., Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996), and *In re Vial*, 115 F.3d 1192, 1195-97 (4th Cir. 1997) (determined that *Bailey v. United States*, 116 S. Ct. 501 (1995), is neither a new rule of constitutional law, nor made retroactive by this Court to cases on collateral review, so it furnishes no basis for successive § 2255 petitions). If there is a claim based on previously undiscoverable facts, but it does not implicate constitutional error, or goes strictly to sentence, § 2244(b)(2)(B) precludes its consideration in a successive petition. *See, e.g., Bush v. Singletary*, 99 F.3d 373 (11th Cir. 1996) (successive § 2254 petition in a capital case based on claim of sentence disproportionality arising out of recent vacation of codefendant's death sentence precluded because federal constitution not implicated); *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997) (successive petition claiming ineffective assistance in capital sentencing precluded). Far from contradicting the intent of Congress, preclusion of such successive petitions is precisely what the amendment to § 2244 was designed to accomplish.

B. The State Did Not Waive the Right to Assert the Successiveness of Martinez-Villareal's Petition. (RB 24-27.)

Martinez-Villareal berates Petitioners for having first argued that his competency claim was not ripe for adjudication when it was first raised (which was plainly true), and then having asserted – after the passage of the Act – that the claim should be precluded, which sequence of events is contended to constitute a waiver of the "defense" of successiveness. Whether or not the new restrictions on successive petitions established by the Act are technically "jurisdictional," it is preposterous to argue that Petitioners "waived" the Act-based successiveness "defense" years before the legislation creating that "defense" was enacted. Martinez-Villareal offers no authority that a party can unintentionally waive a defense before it is ever created. This Court held in *United States v. Wells*, 117 S. Ct. 921, 926 (1997), that a good-faith change of litigation position, based on an unforeseen intervening change in the law, is "[n]othing the Government has done [that] disqualifies it from the chance to make

its position good in this Court." Martinez-Villareal's spurious waiver argument must be rejected.

C. Miscellaneous Arguments That Martinez-Villareal's Second Petition Should Not Be Deemed Successive. (RB 27-34.)

This patchwork of arguments is intended to support the court of appeals' view that Martinez-Villareal's second petition should not be deemed successive for purposes of the Act. The first several pages (27 to mid-30) merely reiterate how dreadful the State is, state in conclusory fashion that the court below was correct, and note some commonplaces about the text of the Act. Martinez-Villareal makes the illogical assertion that, "if, as *Lonchar* [*v. Thomas,* 116 S. Ct. 1293 (1996)] teaches, a petition by a different person is not a 'second or successive habeas corpus application under section 2254,' neither is a petition occasioned by a different state court judgment." (RB 30.) Of course, *Lonchar*'s facts (that relatives of a petitioner had previously attempted to file petitions on his behalf, which were dismissed when he opposed them) are totally different from this case. *Lonchar* did not concern the amended form of the habeas statute, and did not opine about the successiveness of petitions occasioned by different state court judgments, so it provides no support for Martinez-Villareal's position.

Martinez-Villareal attempts to use his idea that petitions based on different state court judgments can never be successive to explain why, in the past, competency for execution claims have not been dismissed as abuses of the writ. (RB 30-31.) This approach is transparently wrong because under the previous incarnation of § 2244(b), the criterion was not how many state court judgments were involved, but whether the second application was predicated on a "factual or other ground" excusably not adjudicated in the first petition. Furthermore, this approach "mixes apples and oranges," because "abuse of the writ" has been expurgated from the § 2244 lexicon. Whether Martinez-Villareal would have been found to have abused the writ under prior law is irrelevant to how the current law is to be understood; although a few phrases

were carried over, the operative language now is vastly different. "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended." *Brewster v. Gage,* 280 U.S. 327, 337 (1930).

The next several pages include a complaint that, because res judicata ordinarily requires a "full and fair opportunity to litigate" a matter before it is precluded, and Martinez-Villareal has not been able to litigate his competency claim in federal court, the Act should not be interpreted to preclude that claim (n.17 and text). However, the claim *was* fully litigated, in 4 days of state court hearings. Further, it is axiomatic that habeas corpus is not subject to the ordinary rules of res judicata. Finally, the Act's restrictions are a "*modified* res judicata rule," which not only "codifies some of the pre-existing limits on successive petitions" but also "further restricts the availability of relief." *Felker v. Turpin,* 116 S. Ct. at 2340 (emphasis added). Hence, Martinez-Villareal's reliance on res judicata is totally misplaced.

The real gist of Martinez-Villareal's argument seems to be that the nature of an incompetency for execution claim is such that it will always be either too early (not ripe) or too late (raised in a successive petition, after all the other claims have been litigated to conclusion), so that to apply the Act's prohibition against sentence-based successive petitions will mean it can never be addressed in habeas corpus proceedings. Presuming that, before there can be a second petition, "there must be a 'first' petition in which the challenge to the judgment could possibly have been presented on the merits," and that Congress could not have intended to thus preclude an entire class of claims, Martinez-Villareal concludes that such a reading of the statute is incorrect. (RB 32-34.)

Neither presumption is correct. First, this Court has repeatedly repudiated the idea that there is any absolute right to have a federal issue litigated in federal court. (Opening Brief at 43.) Second, even a casual reading of the Act reveals several places where Congress intentionally derailed whole classes of claims in addition to the prohibition of all sentence-based successive petitions. Relief is banned in first petitions for all law-based claims where the state court decision was

not contrary to or an unreasonable application of Federal law as determined exclusively by this Court. § 2254(d)(1). It is banned in first petitions for all fact-based claims where the state court determination was not unreasonable. § 2254(d)(2). It is effectively banned for most fact-based claims where the petitioner failed to develop the factual basis in the state courts, because he generally will not be afforded an evidentiary hearing in the federal courts. § 2254(e)(2). Finally, it is precluded on all claims that are not brought within the 1-year statute of limitations established by § 2244(d). Thus, there are numerous situations in which Congress plainly intended that a state inmate not be afforded even "a 'first' petition in which the challenge to the judgment could possibly have been presented on the merits."

The efforts of *amicus* American Bar Association to wring evidence of some other intent from the language of the statute are equally unavailing. ABA asserts that "presented" in § 2244(b)(1) actually means "raised and *determined* in a prior application," in the sense that it has been "adjudicated on the merits." (ABA 4-5, emphasis in original.) This contention blithely ignores several facts: (1) In common legal usage, to "present" does *not* indicate determination; it only means, "[t]o lay before judge, magistrate, or governing body for action or consideration; submit as a petition or remonstrance for a decision . . . " BLACK'S LAW DICTIONARY 1346-47 (rev. 4th ed. 1968). (2) "Determined" was removed from the only place it appeared in the text of the statute, § 2244(a). (3) That the section's title is "Finality of Determination" signifies nothing; "the title of a statute and the heading of a section cannot limit the plain meaning." *United States v. Minker*, 350 U.S. 179, 185 (1956). (4) "Determination" does *not* imply a decision on the merits, as opposed to some other conclusion of the matter. "A case or controversy is 'determined' when it is decided," *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 688 (1960), and a resolution on the merits is not necessarily implied here, because § 2244(d) contemplates dismissal simply for failure to meet a time limit. Thus, the statute does not require a prior decision on the merits before a petition is precluded as "successive."

In short, the problem is not that there is no plain meaning, but merely that Martinez-Villareal, his *amici*, and the court of appeals find the plain meaning unpalatable. The intent of Congress, manifested throughout the Act, was to severely limit the categories of claims that could be presented in habeas proceedings, in first as well as successive petitions, and the preclusion of sentence-based successive petitions in § 2244(b)(2)(B)(ii) is consistent with that intention. Therefore, the court of appeals was *not* free to subvert Congressional intent by "construing" the Act in a manner directly contrary to its plain meaning.[5]

---

[5] This does not mean, however, that the whole issue can be sidestepped (as suggested by several *amici*) by saying that a *Ford* claim does not fall within the traditional concept of "custody," so that it should be resolved in a 28 U.S.C. § 1983 action rather than a habeas petition (an approached denounced by Martinez-Villareal himself, RB 35 n.19). First, Section 1983 was characterized as "a proper remedy for a state prisoner who is making a constitutional challenge to *the conditions of his prison life*," *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (emphasis added), but whether one is to be deprived of life (*i.e.*, have his "length of custody" ended) is not reasonably understood as a "condition of" prison life. In *In re Sapp (McQueen v. Patton)*, 118 F.3d 460, 463 (6th Cir. 1997), the Sixth Circuit rejected a challenge to execution by electrocution with the following ruling:

> McQueen's argument that his purported § 1983 action is simply a challenge to his "conditions of confinement" rather than to the sentence itself is unpersuasive. The prevention of the execution is itself an overturning of the sentence. McQueen was sentenced to death, not simply to a lifetime of litigating about death. Thus, this challenge is not equivalent to a simple "conditions of confinement" action, such as a claim that a prisoner's cell is too cold, though the prisoner doesn't object to being imprisoned in a warmer cell.

Second, *Ford*, of course, was itself a habeas action, and every case treating competency for execution has likewise been adjudicated through such proceedings. *See In re Davis*, 121 F.3d 952, 954-55 (5th Cir. 1997) (discussing cases). Moreover, even before passage of the Act, this Court made clear that § 1983 should not be utilized to avoid the limitations on successive habeas petitions, regardless of whether they raised claims

II

SINCE THE STATUTE IS UNAMBIGUOUS, THE SUSPENSION CLAUSE ISSUE CANNOT BE AVOIDED.

Martinez-Villareal makes vague assertions about the complexity of the issues that might be involved in this case and hypothetical future cases. (RB 34-37.) All this really means is that this case raises a significant constitutional dispute – *i.e.*, is the very sort of matter this Court was established to resolve – and constitutes no grounds for avoiding the issue.

Closer to a meaningful argument is Martinez-Villareal's reliance upon the line of cases, exemplified by *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), which indicates that constitutional issues should not be considered unnecessarily. However, Martinez-Villareal ignores his own quotation from *United States v. Locke*, 471 U.S. 84, 92 (1985), that the legitimate premise for declining resolution of a constitutional issue is that, "a construction of the Act is *fairly possible*" by which that can be done. (RB 36, emphasis added.) Where, as here, the Congressional intent in the statute is clear, "that finding renders the preference for avoiding a constitutional question inapplicable." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 n.9 (1996); *see also Swain v. Pressley*, 430 U.S. 372, 378 (1977) (clarity of D.C. Code provision claimed to violate Suspension Clause did not permit resort to statutory construction to avoid the constitutional issue).

---

concerning executions. *Gomez v. U.S. District Court*, 503 U.S. 653 (1992); *Lonchar v. Thomas*, 116 S. Ct. at 1301. Finally, Congress' intention that claims concerning death sentences be handled *via* habeas is unmistakable – 21 U.S.C. § 848(q)(4)(B) only provides funds for "post-conviction proceeding[s] . . . seeking to vacate or set aside a death sentence" if brought "under section 2254 or 2255 of Title 28," and the Act's detailed new provisions for capital cases in Chapter 154 all contemplate habeas proceedings. Such clear intent by the author of both remedial processes must prevail, and *Ford* claims must be resolved through habeas proceedings.

The Court's abhorrence for treating a statute as "a nose of wax, to be changed from that which the plain language imports," under the pretense of avoiding a constitutional issue, *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926), was unanimously reemphasized this term, in *Salinas v. United States*, 118 S. Ct. 469, 475 (1997):

> "No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope. . . . " *United States v. Raynor*, 302 U.S. 540, 552 (1938). As we held in *Albertini, supra*, [472 U.S. 675] at 680,
>
> > Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 (1985).
>
> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. at 1124, "[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Id.* at n.9. *Gregory [v. Ashcroft*, 501 U.S. 452 (1991)] itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. See *Gregory*, 501 U.S., at 467. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue. *Ibid.*

"A constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily." *Edmond v. United*

States, 117 S. Ct. 1573, 1578 (1997). Section 2244(b)'s restrictions on successive petitions are so clear as not to brook an "interpretation" that magically creates a class of "non-successive" petitions exempt from those limitations. Therefore, this Court should resolve the Suspension Clause issue.[6]

III

THE *AMICUS* BRIEFS SUPPORTING MARTINEZ-VILLAREAL PROVIDE NO SUBSTANTIAL REASON TO DISAGREE WITH PETITIONERS' POSITION.

In addition to the foregoing, Petitioners contend that the remaining arguments by Martinez-Villareal's *amici* are unpersuasive.

A. NACDL. The primary argument offered by this *amicus* against applying § 2244(b) to preclude Martinez-Villareal's successive petition fleshes out a suggestion by Martinez-Villareal, that to do so will deprive him of due process by retroactively creating "new legal consequences," namely, "the outright extinction of respondent's right to secure plenary review of his *Ford* claim." (NACDL 7-9; RB 37.) However, this argument is fatally flawed because at no time before the passage of the Act did Martinez-Villareal actually *have* a "*Ford* claim." The claim was dismissed when presented in his earlier petition because it was premature, since he was not facing execution within the foreseeable future. *Martinez-Villareal v. Lewis*, CIV 86-296 TUC RMB, unpub. order of Oct. 21, 1994, at 18-19. Given the proverbial fluidity of mental states, "the issue of sanity is properly considered in proximity

[6] The urgency for decision of all the issues on which certiorari was granted is magnified by the lower courts' unbridled urge to create further exceptions to the statute whenever circumstances are deemed "unique," on the authority of the Ninth Circuit opinion in this case. *See United States v. Scott*, 124 F.3d 1328 (10th Cir. 1997) (ineffective assistance of counsel claims); *Ceja v. Stewart*, 1998 WL 23241 at *2-*5 (9th Cir. Jan. 20, 1998) (dissent urges review of claim that length of time on death row had created newly-ripe Eighth Amendment claim).

to the execution." *Herrera v. Collins*, 506 U.S. 390, 406 (1993). Hence, Martinez-Villareal possessed no cognizable "*Ford* claim" until March 12, 1997, when the Arizona Supreme Court issued a warrant for his execution, almost a year after the Act became law. (JA 27.) Before enactment, Martinez-Villareal possessed nothing more than a hope or expectation that he would be allowed to raise the competency claim in a successive petition.

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, *or upsets expectations based in prior law*. Rather, the court must ask whether the new provision attaches new legal consequences to *events completed before its enactment*.

Landgraf v. USI Film Products, 114 S. Ct. 1483, 1499 (1994) (emphasis added). The relevant event for purposes of a *Ford* claim is an *imminent* execution, and since in this case that event certainly post-dates enactment of the AEDPA, it is logically impossible to say that the Act is being applied "retrospectively" to Martinez-Villareal.[7]

2. ACLU. Martinez-Villareal himself having dodged the issue, the *amici* attempt to demonstrate that the Suspension Clause should be construed as protecting 200 years of unforeseen judicial and statutory accretions, rather than the limited common law writ familiar to the drafters (a claim rejected in *Denton v. Norris*, 104 F.3d 166, 167 (8th Cir. 1997)). ACLU begins (at 7) by disparaging Petitioners' brief as "a virtual download from a law review article prepared by a former

[7] This also disposes of NACDL's suggestion (brief at 12-13) that this case was properly returned to the district court pursuant to F.R.C.P. 60(b); no authority is provided that that rule is legitimately employed where a dismissed non-existent claim subsequently comes into being. In any event, the weight of authority in pre-AEDPA cases was that Rule 60(b) could not be used to avoid the "cause and prejudice" standard for successive habeas petitions. *See Bonin v. Calderon*, 999 F.2d 425, 428 (9th Cir. 1993) (listing cases). By parity of reasoning, it cannot be used to subvert the new restrictions on such petitions.

Justice Department lawyer nearly a half century ago," referring to Rex A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952). Unmentioned is the fact that Collings was a counsel for the Government in *United States v. Hayman*, 342 U.S. 205 (1952), in opposition to Paul Freund, whose views are heavily relied upon by ACLU at 11-13. Freund argued a theory that the universal understanding of the 1679 English Habeas Corpus Act as not applying to prisoners in execution of sentence resulted from a "misplaced parenthesis," supposedly bolstered by *Bushell's Case*, 124 Eng. Rep. 1006 (1607). The argument was implicitly rejected by the *Hayman* court's statement that, "at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive that confinement was legal [which] prevented issuance of the writ without more." 342 U.S. at 211. Although Freund's view was accepted in *Fay v. Noia*, 372 U.S. 391, 403-04 (1963), another mainstay of ACLU's brief, both points have been refuted by scholars in addition to Collings. *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1164-65 (1995); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 273-74 (1980); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 171 (1970); Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 461-68 (1966); Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. CHI. L. REV. 243, 262 (1965). Hence, neither Freund nor *Fay* should carry much weight with this Court.

Not to be outdone by its forbearer, the ACLU brief (14-16) presents its own singular theory, that when Congress creates lower federal courts pursuant to Article III, they instantly acquire inherent authority to issue habeas writs, in a manner equivalent to this Court's original jurisdiction. Since this tack runs aground on *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), ACLU (16-17) propounds that when *Bollman* spoke of the necessity for the power to issue the writ to be "given by written law," it referred to the Constitution as well

as to statutes. However, from its very first sentence, *Bollman* distinguishes between "the constitution or the laws of the United States." 8 U.S. at 93. Thus, the inquiry was, "whether by any statute compatible with the constitution of the United States, the power to award a writ of *habeas corpus* . . . has been given to this court." (*Id.* at 94.) This sentence is twice fatal to ACLU's theory: if habeas authority is bestowed directly by the Constitution, there is no need to consider whether there is a statutory basis for it (so the authority does come from statute, not the Constitution); further, even this Court gets its habeas authority by statute, so there is no "original" habeas jurisdiction here, let alone in the lower federal courts. Likewise, if the authority is "original" and direct from the Constitution, the rest of *Bollman*, with its careful statutory analysis, is pointless. ACLU's revisionist speculation that somehow the Court "overlooked" a Constitutional basis for habeas jurisdiction when it decided *Marbury v. Madison*, 5 U.S. (1 Cranch 137) (1803), and neglected to correct this oversight when directly confronted with the issue in *Bollman*, verges on the ludicrous. (ACLU at 17-18.)

Finally, ACLU (21-22) suggests that the basis for state prisoner habeas is the Fourteenth Amendment, rather than the statute of 1867. First, ACLU has its chronology wrong: Congress proposed the Amendment in 1866, the year before enacting the statute, but it was not ratified until July of 1868. Historical Notes, U.S.C.A. It makes no sense to say that there was a jurisdictional statute in place for more than a year before there was anything which could be adjudicated under it, and the historical evidence does not support the theory that the Act was intended to enforce the Amendment. Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 52-55 (1965); Forsythe at 1152. Moreover, by its own terms, the Amendment prohibits *states* from making or enforcing laws which abridge the privileges or immunities of citizens of the United States. This language has generally been understood to mean only that the states could not discriminate among their citizens, primarily to protect the emancipated slaves, who previously had not been deemed citizens. The "privileges and

immunities of citizens" were the benefits already bestowed by other provisions of the Constitution. JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 179-80 (1956). Thus, while the Amendment might be construed to prohibit *states* from suspending habeas corpus, it simply does not speak to Congress' ability to enlarge or reduce *federal* court habeas authority.

3. ABA. In addition to other matters previously dealt with, this brief (16-25) asserts that from 1789 to the present, Congress has always authorized federal review "as of right" for any prisoner with a federal constitutional claim, and that this is such an "established principle" that it should not be deemed to have been modified by the Act in the absence of a clearer statement of intent to do so. As indicated by its reliance on *Whitten v. Tomlinson*, 160 U.S. 231 (1895), a rather obscure case that does not support the proposition for which it is cited, this is an amalgam of arguments previously made by Gary Peller and James Liebman, which are thoroughly refuted in Forsythe at 1146-60. The argument is internally self-defeating, because it acknowledges that from 1789 until 1867 (during which habeas review of state prisoner cases was clearly precluded by the language of § 14 of the Judiciary Act), review by writ of error was also unavailable unless the federal question appeared on the "face of the record." Thus, every state prisoner with a federal constitutional claim was *not* entitled to some kind of federal review as of right during this period. The brief cites not a single statute or decision from this Court explicitly recognizing this supposedly permanent and paramount intention of Congress, nor does it address the Court's repeated explicit rejections of the idea that there is some general right to federal review. (Petitioners' Brief at 43.) In short, the contention is transparently untenable.

IV

THE COURT POSSESSES JURISDICTION OVER THIS CASE.

In both their certiorari petition and their first Brief on the Merits, Petitioners asserted that this Court possesses "statutory" certiorari jurisdiction over this case, despite the prohibition on certiorari review contained in § 2244(b)(3)(E), for two reasons. First, that prohibition, by its own terms, only precludes review of "[t]he grant or denial of an authorization . . . to file a second or successive petition," but the court of appeals was emphatic that it was neither granting nor denying permission to file a successive petition, instead dismissing "as unnecessary" the motion requesting permission, because in its view Martinez-Villareal was filing a "first" petition, for which no permission is required. (JA 194.) Martinez-Villareal acknowledges that the statutory language is "very explicit" (RB 38), but since a reasonable reading of that language shows that the prohibition on review does not apply to this case, he attempts to shift ground, and relies on this Court's shorthand reference to the statute as precluding review of "a judgment on an application for leave to file" a second petition. (RB 40-41, quoting *Felker v. Turpin*, 116 S. Ct. at 2339.) This ploy is plainly specious, because it is obvious that if a question of statutory interpretation arises, it is the text of the statute, not a precis of it, which must be analyzed. Since the statutory language does not encompass the judgment entered by the court of appeals here, the prohibition on review does not apply.

Second, in the opening brief (at 47) Petitioners pointed to previous cases in which this Court held itself not bound by prohibitions against review of specific determinations *under* a statute when the issue presented was the construction or constitutionality *of* the statute. Neither Martinez-Villareal nor NACDL (the only *amicus* addressing jurisdiction) even discuss them, tacitly conceding that the Court's jurisdiction on this basis is proper.

Since jurisdiction by "statutory" certiorari is certain, there should be no need to unravel the complexities of

extraordinary writ jurisdiction. However, Petitioners maintain that, if statutory certiorari is for some reason unavailable, jurisdiction exists pursuant to 28 U.S.C. § 1651(a), for the reasons discussed at length in the certiorari petition and their first Brief on the Merits. Once again, neither Martinez-Villareal nor NACDL so much as attempt to distinguish Petitioners' cases. Thus, it stands unrefuted that Petitioners are entitled to an extraordinary writ if statutory certiorari is unavailable, so there is no jurisdictional bar to the Court deciding this case.

CONCLUSION

The plain meaning of 28 U.S.C. § 2244(b)(2)(B)(ii) dictates that Martinez-Villareal's latest petition is indeed a successive petition, which must be precluded. Because it is evident that all the Suspension Clause protects is the kind of habeas corpus known to the Framers in 1789, the Clause presents no obstacle to enforcement of the AEDPA. Therefore, Martinez-Villareal's successive petition presenting his claim of incompetency for execution is precluded, and the court of appeals' order directing consideration of it must be vacated.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. MCMURDIE
Chief Counsel
Criminal Appeals Section

BRUCE M. FERG
Assistant Attorney General
(Counsel of Record)

Attorneys for Petitioners